No. 26

In the Supreme Court of the United States

OCTOBER TERM, 1960

THE UNITED STATES, PETITIONER

v.

MISSISSIPPI VALLEY GENERATING CO., ON ITS OWN BEHALF AND TO THE USE OF OTHERS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

REPLY BRIEF FOR THE UNITED STATES

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In this reply brief, we correct the many factual errors in respondent's brief by pointing out the relevant findings of the Court of Claims which contradict respondent's version of the facts and support the factual structure on which we rest our legal argument. We shall also discuss certain of the legal contentions made in respondent's brief which we did not sufficiently answer in our main brief.

I

WENZELL PLAYED A SIGNIFICANT ROLE WITH RESPECT TO THE TRANSACTIONS BETWEEN THE GOVERNMENT AND THE RESPONDENT

The basic theme running through all the events leading up to the negotiation of the actual contract in the present case is, in the words of the majority of the court below, that "[w]hile the contract itself contained nothing of Wenzell's work, the fact that it was made at all may have been a result of his work" (R. 13).

Despite this clear finding by the Court of Claims, the major portion of respondent's brief is devoted to an attempt to demonstrate that "Wenzell was not a significant person in this transaction; he did not play a significant role * * *" (Resp. Br., p. 9). Specifically, respondent's argument may be summarized in the following propositions: (1) "Whatever influence Wenzell had as a Budget Bureau consultant * * * related only to the February 25 proposal * * *," and his "activities in connection with the February 25 proposal are in their proper perspective when their unimportance initially is realized * * *." (2) Wenzell "had nothing to do with the reviews and analyses of the April 10 proposal * * *." (3) Nor did he have anything to do with "the decision to begin the negotiation of the contract, the negotiation of the contract, or the extensive reviews and analyses of the contract before it was finally executed * * *." In sum then, respondent maintains that "Wenzell * * * did not assert *any* influence, let alone any *significant influence*, over the transaction in suit here, *i.e.*, the contract" (Resp. Br., p. 26). The court's findings of fact, however, show

Wenzell in quite a different role. In discussing his participation, we shall rely on the court's findings—which run counter to respondent's factual argument at almost every point.[1]

1. *Wenzell's continuing role as to the cost of money, and the importance of that factor.*—There can be no dispute that Wenzell's primary function "was to assist the Bureau * * * with respect to the probable interest cost of any financing plans that might be discussed. His work was to be in the technical area of comparative costs" (F. 45, R. 70). Respondent does not dispute this fact (see Resp. Br., pp. 9, 14–15), but rather attempts to minimize the importance of it.

In contrast, the court below had no trouble in emphasizing the importance of Wenzell's function in ascertaining the cost of money. As it pointed out: "It was well known that the cost of money played an *important part* in the cost of the entire project and in the price at which the energy could be produced and sold" (F. 55, R. 76, emphasis added; see also Fs. 47, 67, R. 72, 84). Moreover, "[i]t was always contemplated that the cost of money would be reflected in the capacity charge to the Government, and * * * the cost of money is the *largest component* of cost included in the capacity charge" (F. 104, R. 105, emphasis added). Finally, inasmuch as the Administration wanted "to make a fair and prudent bargain with" private enterprisers, the Bureau of the Budget, in order "to know what would be a fair bargain * * * had to know what interest rate the enterprisers would

[1] In the Appendix, *infra*, pp. 40–41, we give an index and short identification of various individuals mentioned in the findings.

have to pay on the bonds which they would have to sell to finance the project. * * * Since Hughes knew * * * [Wenzell] and trusted him, it was natural that he should look to him for advice on the cost of money" (R. 5). The ultimate object of the Budget Bureau of course was "to obtain the best [interest] rate possible * * *" (F. 55, R. 76).

Wenzell really worked at his task of ascertaining the cost of money. Thus, on February 5, 1954, he arranged a meeting in his office at First Boston with Harter and Cannon, vice presidents of First Boston's sales department, and Miller, an assistant in First Boston's buying department who had participated actively in the financing of the Ohio Valley project. As the Court of Claims summed up the results of this meeting: "Since Harter and Cannon were in touch with the securities markets, Wenzell asked for their best judgment on the interest rates that would have to be paid for funds borrowed to finance the construction of a plant similar to OVEC, taking into account three hypothetical bases of corporate capitalization * * *. After careful consideration of the problem, Wenzell was told that money could be obtained on the three hypothetical bases at the following respective interest rates: (1) 3½ percent, (2) 3½ percent, and (3) 3¼ percent. * * * Later, during the same day, Wenzell had a telephone conversation with Dixon [chief official of one of the sponsors] and advised him about the result of the meeting." (F. 58, R. 77).

Upon a request from Hughes of the Budget Bureau, "that further studies be made on other forms of capitalization and on different periods for repayment of the debt * * *" (F. 59, R. 77–78), Wenzell, on

February 10, 1954, "had another meeting at First Boston with Cannon, Harter, and Miller to obtain some further information on interest costs in relation to the longer period of amortization * * *. [T]he conclusion was reached that the loan could be made on the basis of an interest rate of 3½ percent" (F. 60, R. 78–79).

"[O]n February 23, 1954, Wenzell drafted an opinion letter which he showed to both Dixon and Hughes" (F. 67, R. 82). The letter contained a complete analysis of the problems of financing and concluded that the interest cost would not exceed 3½ percent per annum (see F. 67, R. 82–83). It is true that "[t]he draft prepared by Wenzell on February 23 was not formally executed by First Boston, but, if it had been signed and sent by First Boston, it would have substantiated the oral opinion previously obtained by Wenzell from First Boston and conveyed to Hughes and Dixon" (F. 67, R. 84). Indeed, as Raben of Sullivan and Cromwell had indicated, the question of whether First Boston formally signed the opinion letter "was purely academic since, in point of fact, Wenzell had already supplied the information to the Bureau and to Dixon, and the letter would amount to no more than confirmation of the oral information" (F. 72, R. 87).

Respondent attempts to minimize the quality of the information which Wenzell obtained by pointing out that "[n]o banking house has a monopoly upon money market information. * * * When asked for probable money rates, they come up with almost identical ones; in this case the various banking houses consulted did give identical information—3½% * * *" (Resp. Br.,

p. 16). The court below itself supplied the answer to this argument: "Wenzell could have obtained this information from other sources, but he was acquainted with the First Boston executives and considered that First Boston was one of the best and most reliable sources, if not the best source, of such information" (F. 58, R. 77). Moreover, the sponsors themselves wanted to obtain reliable financing information; indeed, their ultimate offer was primarily conditioned on such information (F. 67, R. 83; see *infra*, pp. 8, 15–16).

Respondent argues, however, that "[t]he information that Wenzell obtained from First Boston * * * was merely an estimate of what the interest rate would be if the market remained as it then was" (Resp. Br., p. 15), and that therefore "[t]he institutional investors were not concerned with First Boston's prediction, some months before, of what the interest rate would probably be; they were concerned with the actual interest rate they could get for their money in the then market" (*id.*, at p. 17). In so arguing, respondent implies that the estimate of future interest rate has little relevance to what the actual future interest turns out to be, and attempts to illustrate its argument by pointing out that the actual interest rate turned out to be "approximately 3.58%" (*ibid.*). Respondent's point may possibly have relevance to a situation in which the securities which are to be used to finance a proposed undertaking are put out on the open market; the whole thrust of its argument concerns "[b]anking houses [which] make competitive bids for bonds * * *," and it quotes some 1960 reports in the Wall Street Jour-

nal to illustrate recent competitive bidding on the open market for debt security issues (see Resp. Br., p. 16, and n. *). But the securities involved in the present transaction were not placed on the open market at all. The plan for financing involved the "direct placement" of First Mortgage Bonds and unsecured notes with insurance companies and banks (Fs. 114, 115, 117, 121, R. 111–113, 113–114, 115–116).[2] It was for this reason that the estimates by Wenzell and First Boston became so important to the Budget Bureau and the sponsors of the proposal.

The sponsors' concern about the interest rate, their desire for reliable information from First Boston, and the use to which they put the interest-rate information are amply illustrated by the findings below. As early as February 4, 1954, Dixon "engaged Hughes and Wenzell in a conversation about the cost of money for the project * * * [and later] asked Wenzell to do him a personal favor and ascertain the opinion of First Boston on what the interest rates

[2] The plan, as actually worked out, provided for "bond purchase agreements, involving an estimated total commitment of $77,362,000 by the Metropolitan Life Insurance Company and New York Life Insurance Company * * * [and] bank credit agreements, involving an estimated total commitment of $27,086,000 by 24 banks * * *. The bonded indebtedness was to be secured by 3⅝ percent first mortgage bonds, and the debt to the banks was to be secured by the execution and delivery of notes bearing interest at 3¼ percent" (F. 195, R. 186).

The rest of the financing was done by Middle South and Southern which filed with the SEC on November 17, 1954 "an application to authorize plaintiff to issue 55,000 shares of its common stock having a par value of $100 per share and to permit Middle South to acquire 43,450 of such shares and Southern to acquire the remaining 11,550 shares, all having an aggregate par value of $5,500,000" (F. 192, R. 185).

in the then current money market would be for financing a project similar to the OVEC project" (F. 57, R. 76–77). On or about February 14, on the basis of the information which Wenzell obtained from First Boston, Dixon, Canaday, Vice President and Director of Middle South Utilities Co., and Seal, Vice President of EBASCO Services, "tried out the application of interest rates" and "made some tentative calculations on the basis of those rates" (F. 61, R. 79).

Moreover, "in reliance on the oral information previously given by Wenzell to Dixon as the opinion of First Boston * * *," Dixon and Yates included the following paragraph in their February 23 proposal:

> We have received assurance from responsible financial specialists expressing the belief that financial arrangements can be consummated on the basis which we have used in making this proposal and under existing market conditions, and *our offer is conditioned upon such consummation* [emphasis added] (F. 67, R. 83).

In addition, on March 2, 1954, Yates wrote a confidential memorandum to the directors of Southern pointing out, *inter alia*, "that First Boston had advised Middle South and Southern that the sponsors' bonds in the amount of $114,000,000 and bearing interest at 3½ percent could be sold to insurance companies under the current market conditions. This statement was based on the information Dixon had obtained from Wenzell and passed on to Yates before the proposal of February 25 was submitted" (F. 77, R. 91).

2. *Wenzell as a general expediter and cost consultant on the first proposal*—In the meantime, Wen-

zell also operated as one of the main middle-men between the Bureau of the Budget and the sponsors' group. In general, the Bureau looked upon him as the man to expedite the preliminary negotiations on the proposed project. Since Wenzell knew Dixon, McAfee, and Yates personally, and had had business relations with them in his capacity as Vice President and Director of First Boston in the past, "Hughes [of the Budget Bureau] asked Wenzell * * * to use such influence as he had with the private utility people to impress upon them the need for prompt action on the matter" (F. 46, R. 71; see also F. 61, R. 79).

Thus, when it was agreed at the January 2 meeting that "Dixon would prepare a study of the cost factors pertaining to the construction by his company of a power plant that could generate 450,000 to 600,000 kw. of power across the river from Memphis in the territory of Middle South * * *" (F. 51, R. 74), it was Wenzell who was chosen by the group to "meet with Tony Seal of Ebasco * * * to inform Seal about * * * the substance of the discussions that had been held in Washington and * * * [to advise] him to get busy on an exhaustive study of the proposed project" (Fs. 53, 54, R. 75).

After the February 25 proposal had been submitted, Wenzell, at the March 1 meeting, "took the position that the estimates of costs in the February 25 proposal were too high" (F. 74, R. 89).[3] Prior to the time when

[3] There is some indication that Wenzell at first attempted to make the Dixon-Yates proposed costs look more reasonable than they were (see Tr. 1060–1061).

the Budget Bureau staff prepared a preliminary draft of its analysis of the February 25 proposal, the staff "had had the benefit of discussing it at considerable length with Wenzell" (F. 75, R. 90). At the March 9 meeting at the Budget Bureau, at which "all present [agreed] that the estimates of costs in the proposal were too high and that an attempt should be made to persuade the sponsors to submit a proposal more favorable to the Government * * *," it was Wenzell who was asked "to talk to Seal to determine whether the sponsors would submit a better proposal * * *," and it was Wenzell who later "told Seal that the cost estimates in the February 25 proposal were too high" (F. 84, R. 94).

On March 15, when "the final draft of the joint AEC-TVA analysis of the sponsors' [first] proposal was prepared and sent to the Bureau * * *," it was Wenzell who was handed, "[a]t Dodge's instruction * * * one copy of the draft * * *" (F. 89, R. 97). And on the next day, when "several representatives of the sponsors met in Dixon's hotel room in Washington and prepared a draft of a letter to Nichols of the AEC in reply to the joint TVA-AEC analysis of the sponsors' proposal * * *," Wenzell—while still a consultant to the Government—was furnished a copy of their draft letter, "and he made several changes in the letter in his own handwriting" (F. 90, R. 98). By March 24, it becam "clear to the sponsors that their proposal of February 25 would not form an acceptable

basis for the negotiation of a contract" (F. 95, R. 100).

In light of all the tasks which Wenzell performed, it is difficult to understand how respondent can characterize his function as one in which he was only "from time to time to carry messages from Hughes to the sponsors to the effect that they should hurry with their proposals" (Resp. Br., p. 9), or "that the only 'decidedly significant' effect the activities of Wenzell may have had in connection with the February 25 proposal was the rejection of that proposal" (*id.* at p. 19). On the contrary, Wenzell's role was far more significant—as the explicit findings of the court below describe in detail.

3. *The relationship of the sponsors' first proposal to their second proposal.*—From March 26 to about April 1, 1954, the sponsors began working on a new proposal which they hoped would meet the objections raised with respect to their February 25 proposal. By April 10, the sponsors had worked out a second proposal which eventually served as the basis for negotiating the contract.

The thrust of respondent's argument with respect to the April 10 proposal is that there was a complete discontinuity between the February 25 and April 10 proposals, that they were "basically and significantly * * * different * * * " (Resp. Br., p. 24), that the April 10 proposal did not rest "'firmly upon the negotiations and analyses of the unsatisfactory first

proposal * * * '" (*id.* at p. 23); that "Wenzell's activities as a Bureau consultant related almost exclusively to the February 25 proposal, which was rejected" (*id.* at p. 25) since "after April 3 Wenzell ceased to serve as a consultant to the Bureau and performed no further services for the petitioner * * *" (*id.* at p. 21), and that "Wenzell did nothing as a Bureau consultant with respect to the April 10 proposal except to confirm the information on the probable cost of money" (*ibid.*). A review of the background of the transaction, however, will amply demonstrate the error of respondent's contentions.

The purpose of the negotiations between the Government and the sponsors was to develop a proposal by which the Memphis area power problem could be solved. The only alternative to the proposal being sought from the sponsors by the Government was the TVA project at Fulton, Tennessee—a project which had been stricken from the 1953 federal budget, and which had been rejected by the Congress in 1954 (F. 23, R. 57). This plan was to be reconsidered for submission to the Congress only if negotiations with Dixon's group fell through (see F. 41, R. 68). The sponsors knew that the President's budget message to this effect referred to them. No one else had been invited to submit proposals; no one else was asked to sit down with the Government and work out cost estimates which would compare favorably with the TVA project; no one else was made privy to the thinking of the Budget Bureau, the Atomic Energy Commission or to the TVA cost estimates. From January 20 to April 10, the Government and the sponsors talked, compared, analyzed, and bargained for a proposal

which the sponsors could stand by and which the Government could look upon as a basis for binding negotiations. Thus, the formulation of the proposal which, in fact, became the basis of the final binding negotiations for the contract was a continuous process extending over the entire period of Wenzell's service, which he did not consider ended until the second proposal was submitted (F. 105; R. 106).

Respondent has made much of the fact that, during the discussions, its first proposal, that of February 25, 1954, was rejected. It would have this Court believe that there was no significant relation between that proposal and the April 10 proposal which formed the immediate basis for the contract itself; that rejection of the February 25 proposal closed the door on all that had gone before; and that all the information about the alternative TVA project, all the discussion on over-all costs for the project, all the analyses as to the capacity of the plant, all the financing information which had been obtained, confirmed and reconfirmed, were put out of the mind of the sponsors while they spun out a new set of cost estimates in the record time of nine days—*i.e.*, on March 24, 1954, they were told that the February 25 proposal was not acceptable (although they did not withdraw it until April 10), yet, by April 3, 1954, they were able to come up with a revised set of cost estimates and were told that if they could submit "a new firm proposal" close to the estimates, such a proposal "would deserve serious consideration" (F. 97; R. 100). In the face of this, we submit that it is patently absurd to contend that the February 25 and April 10 proposals are so distinct as to be completely different. They

were part and parcel of the same transaction, and formed steps in a continuing negotiation.

4. *Wenzell's role with respect to the second proposal.*—Moreover, respondent's characterization of Wenzell's role with respect to the April 10 proposal equally obscures Wenzell's significant contribution to that proposal. On April 3, at a meeting "called by Hughes for the purpose of discussing the sponsors' new cost estimates * * *, Wenzell confirmed to Dixon and Yates, as well as to Hughes, the information which he had previously given them on the cost of money" (F. 97, R. 100–101). Later that afternoon, Nichols, the General Manager of AEC, "told Wenzell that the sponsors had by that time come close to submitting acceptable figures. He suggested that Wenzell encourage the sponsors to refine their figures and to submit a proposal based on a fixed price for the construction of new facilities, with details as to the basis upon which both the demand and energy charges were calculated" (F. 98, R. 101). And the Court of Claims has specifically found that Wenzell's function as a consultant to the Budget Bureau during the period from March 1, 1954, to April 3, 1954, "related principally to the *total costs of the project*" (F. 74, R. 89, emphasis added; see also F. 97, R. 100). These findings in themselves show that Wenzell did more than merely "confirm * * * the information on the [probable] cost of money" with respect to the April 10 proposal. He participated in the general consideration of all cost estimates.

But even if money cost had been the only thing with which Wenzell was concerned, its significance should

not be underestimated. It has already been shown that the cost of money was the single most important cost factor with respect to any proposal for the construction project (see *supra*, p. 3). Wenzell's oral opinion on April 3 was alone sufficient to cast him in a significant role with respect to the April 10 proposals. But Wenzell did far more than that. As the court below recounted in detail:

> Several days before April 12, 1954, * * * a representative of the sponsors either gave Wenzell a copy of the proposal for his examination or called him by telephone and read to him the following paragraph contained in the April 10 proposal:
>
> "We have received assurances from responsible specialists expressing the belief that financing can be arranged on the basis which we have used in making this proposal and under existing market conditions, and *our offer is conditioned upon the arranging of such financing.*"
>
> * * * Wenzell * * * compared the statement on financing in the second proposal with that in the first proposal, *ascertained that the second proposal contained substantially the same provision on the subject,* and knew that it was based upon the interest rate of 3½ percent that he had obtained from First Boston.
>
> * * * [O]n April 9, 1954,* * * [Dixon] telephoned Wenzell, asking him to get the informed judgment of First Boston on the current cost of money. On * * * April 10, Dixon again talked with Wenzell by telephone and was told by Wenzell that it was the judgment of the First Boston that the interest rate would be 3½ percent. *This information was relied upon*

by the sponsors in the drafting of the second proposal. [F. 104, R. 105–106, emphasis added.]

To derive from this finding, as does the respondent, that there was a fundamental discontinuity between the February 25 and April 10 proposals, especially with respect to the particular function which Wenzell was serving, is clearly not justified.

Nor was this the end of Wenzell's activities. At a meeting on April 12, 1954, "the sponsors' representatives stated that * * * they wanted First Boston to give them a letter confirming the oral opinion of the interest rates given by Wenzell to Dixon on April 10. It was agreed that First Boston would give an appropriate written opinion" (F. 107, R. 106). The next day "Hallingby requested Miller to arrange for First Boston to sign the formal opinion letter regarding interest, as discussed the previous day. *Using the Wenzell draft of February 24, James prepared a draft of a letter to be signed by First Boston*" (F. 109, R. 107, emphasis added). The letter was dated April 14 and delivered to James that day (F. 109, R. 108). A mere comparison of the February 24 and April 14 letters indicates that they are worded in substantially the same terms (compare F. 67, R. 82–83, with F. 109, R. 108–109). In addition, Wenzell "participated to some extent" with Miller in "drafting a plan for the debt financing," shortly after May 7 (F. 114, R. 111–112).

Respondent, in answer to these findings of the court, insists that everything Wenzell did after April 3 had no significance with respect to the Govern-

ment's conflict-of-interest defense, since, after that date, Wenzell was no longer a consultant for the Budget Bureau (see Resp. Br., p. 22). Wenzell himself, however, "felt that his relationship with the Budget Bureau terminated on April 10, 1954, the date of the sponsor's second proposal" (F. 105, R. 106). But we do not rest on Wenzell's own view of the terminal date of his government relationship. It hardly seems possible that one may take himself out of the broad terms of 18 U.S.C. 434 by merely putting on different hats, but nevertheless continue to perform the same functions as had been performed prior to the "hat-switching" date. In the first place, the most crucial function which Wenzell performed on April 3 while he was still a Bureau consultant, *i.e.*, confirming the information which he had previously given the sponsors on the cost of money, must certainly be considered to have carried over into his analyses and comparison of the financing statement in the February 25 and April 10 proposals and his reconfirmation of the 3¼ percent interest rate to Dixon on April 10.[4] Moreover, regardless of whether Wen-

[4] The findings also make it clear that Wenzell participated in the general discussions of cost estimates which directly preceded the formal presentation by the sponsors of the second proposal. See *supra*, p. 14, and also F. 97, R. 100: "On April 2, 1954, McCandless made a telephone call to Wenzell in New York, and on Saturday, April 3, Wenzell returned to Washington. On that date, he attended a meeting held at the [Budget] Bureau, where Hughes, McCandless, Adams, Dixon, Yates, Seal, and Canaday were also present. *The meeting had been called by Hughes for the purpose of discussing the sponsors' new cost estimates*" (emphasis added).

zell himself "considered that since his services with the Bureau had ended on April 10, he was acting as a representative of First Boston * * *" (F. 107, R. 107), it hardly seems possible to divorce First Boston's interest opinion letter from Wenzell's work as a consultant to the Budget Bureau merely because the letter was prepared on April 13, and delivered on April 14, in as much as the April 14 letter was based almost entirely on Wenzell's original letter of February 24. Finally, Wenzell's participation in drafting the debt financing plan was merely an outgrowth of his total activities with respect to both proposals while he was a consultant to the Budget Bureau. In short, the fact that Wenzell played no role in the ultimate negotiating of the contract should not obscure his very vital role in providing the reliable information on financing, upon which the sponsors' offer was conditioned, and his other work as expediter and cost consultant (see, especially, F. 104, R. 105).

5. *The close relationship of the accepted proposal to the ultimate contract.*—The close relationship between the February 25 and April 10 proposals and the vital role which Wenzell played with respect to those proposals have already been shown (*supra*, pp. 11–18). Respondent itself is willing at least to grant that Wenzell had a "slight contact with the April 10 proposal," but then nevertheless insists that Wenzell "had no contact whatever with the contract itself, and the contract was a document far different from the proposal" (Resp. Br., p. 30). Respondent refers to the negotiating sessions which began on July 7, 1954, and concluded on November 11, 1954, with the sign-

ing of the contract (F. 133, R. 120), attempts to make much of the fact that these negotiations began some three months after the April 10 proposal in order to emphasize Wenzell's remoteness from them (see Resp. Br., pp. 25, 29, 30–31), and insists that "[t]he contract grew out of these negotiating sessions—and only out of them * * *" (*id.*, at p. 31).

But the contract was not something which materialized out of thin air between July 7 and November 11; negotiations did not begin on a *tabula rasa*. There is no basis whatsoever for separating the negotiations of the proposal from the negotiations of the formal contract. The extraordinary amount of time and energy which was invested by Government officials, the sponsors and their executives, engineers, lawyers, and technicians in the formulation of a proposal which would be acceptable to the Government in the time period between January 20 and April 10 was not just mere preliminary sparring of no subsequent importance. Within fourteen days of the April 10 proposal, the Budget Bureau had already reported the results of its analysis to the President with the recommendation that the Bureau "be authorized to instruct AEC to proceed to complete arrangements for a contract with the sponsors * * *" (F. 129, R. 119). It was only when the Von Treskow proposal (see our main brief, p. 8) intervened that the decision "to negotiate a contract with the sponsors *on the basis of the April 10 proposal*" was postponed (F. 129, R. 119, emphasis added). By the middle of June, after the Budget Bureau and AEC had worked out a comparative summary analysis of the two competing proposals, the President finally stated "that AEC would be in-

structed to proceed with negotiations *under the sponsors' proposal* for the purpose of entering into a *definitive contract within the terms of the proposal.* * * * On June 16, 1954, letters approved by the President were sent by Hughes [of the Budget Bureau] to AEC and TVA, directing AEC to proceed with negotiations with the sponsors, with a view to signing a definitive contract *on a basis generally within the terms of the proposal* * * *" (F. 130, R. 119, emphasis added). The negotiations finally began on July 7 and ended on November 11, with the signing of the contract (F. 133, R. 120).

The details of the negotiations need not be recounted here; they are amply spelled out in the findings (Fs. 133–136, R. 120–122). As late as August 11, the sixth proof of the contract was still "within the terms of the proposal made by the sponsors on April 10, 1954" (F. 134, R. 121). To be sure, "there were numerous changes in and additions to the terms set forth in the proposal," and the sponsors "were not successful in limiting the consideration of the Government negotiators to the provisions of that instrument"; nevertheless, the fact remains that "[i]n a general way, the contract was within the terms of the proposal" (F. 134, R. 121).

Thus, when it is considered that the information on financing given by Wenzell to the sponsors "was relied upon by the sponsors in the drafting of the second proposal" (F. 104, R. 106), that the interest opinion letter written by First Boston on April 14 was based on Wenzell's original draft letter of February 24 (*e.g.*, F. 107, R. 107), that Wenzell "participated to some extent" with Miller in "drafting a plan

for the debt financing" shortly after May 7 (F. 114, R. 111–112), which plan had its origin during the period of late January to early April, and that the contract itself grew out of the April 10 proposal which itself was part and parcel of the negotiations carried on from January to April (see *supra*, pp. 11–14), the only conclusion that can be drawn is that Wenzell's role in the transaction for the Government cannot be considered as insubstantial or remote.

II

DURING THE PERIOD WENZELL ACTED AS AN AGENT FOR THE UNITED STATES FOR THE TRANSACTION OF BUSINESS WITH DIXON-YATES, HE HAD AN INDIRECT INTEREST IN THE CONTRACT, WHICH WAS ULTIMATELY NEGOTIATED, AND THEREFORE CAME WITHIN THE SCOPE OF 18 U.S.C. 434

Respondent states as the general rule that, in order for there to be a conflict of interest, there must be "some understanding between the prime contractor and the prospective subcontractor during the time the public official is participating in governmental activities relating to the prime contract" (Resp. Br., pp. 57–58); "[i]n the absence of such relationship or understanding, any subsequent dealings between the public official and the government contractor are held to be immaterial in so far as the validity of the contract is concerned" (*id.* at p. 56). We do not agree that there must be an "understanding", in the sense of an explicit or implicit consensual agreement or accord, but we do concur that there must be a relationship making it likely that the prospective subcontractor (in which the official is interested) will ac-

tially become such a subcontractor of the potential contractor with which the official is dealing. Such a relationship plainly existed here.

Respondent's view of the facts is not at all that revealed by the findings and opinion below. Respondent maintains that "First Boston was not retained as one of MVG's financial agents until almost two months after Wenzell's active period as a Budget Bureau consultant ended (March 16 to May 12), and over one month after he ceased to serve as a consultant (April 3 to May 12)" (Resp. Br., pp. 35-36), so that Wenzell could hardly be considered to have had an indirect interest in the contract; rather, Wenzell "[a]t most * * * [only] had a hope that, if subsequently negotiations were decided upon by the Government and such negotiations resulted in a contract, and if respondent decided to use the services of a financial agent in negotiating financing with institutional investors, First Boston might get the job * * *" (*id.* at 54). This suggestion of an anemic "hope" is at war with the factual conclusions of the Court of Claims.

1. First, it is difficult to characterize the transactions in which Wenzell participated as evidencing "only a hope" or a slim possibility that the Government would enter into final negotiations, and that these negotiations would eventuate in a contract. On the contrary, the Court of Claims pointed up the virtual inevitability of the contract (R. 12):

> It hardly needs to be said that Wenzell and his permanent employer, First Boston, wanted

> the explorations into the possibility of making a contract for the erection of a generating plant with private capital to eventuate in a contract. Their enthusiasm in this purpose equalled, no doubt, but could hardly have exceeded, that of the President of the United States and his Director of the Bureau of the Budget. Wenzell was not hired by the Director to discover reasons why a contract should not be made. * * * The Administration's * * * powerful urge to get a contract put it at a possible bargaining disadvantage, but no claim is made in this case that the contract which was made was an improvident one.

2. Moreover, the Court of Claims did not look upon the possibility that First Boston would get the financing agency as merely a fleeting hope; rather, the court believed that "[t]here was * * * a substantial possibility that * * * First Boston, as one of the largest and most experienced firms engaged in arranging the financing of such enterprises, might be employed by the company which got the contract". (R. 14).

It cannot be said, on the basis of the findings, that First Boston and Wenzell were not fully aware of this strong possibility of getting the financing contract and did not work actively to obtain it. Woods, the Chairman of the Board of First Boston, was firmly convinced that "the financing, which First Boston had been retained to handle, had flowed directly from the conversation which Woods had had with Dodge in May 1953, when Woods had offered Wenzell's services to the Budget Bureau to assist the Administration in

connection with its power policy * * *" (F. 117, R. 114). As early as February 23, Wenzell had raised the conflict-of-interest problem with Hughes of the Budget Bureau. Wenzell's prime concern involved the draft interest opinion letter of February 24, which he had prepared on a First Boston letterhead. Since "First Boston was the source of the information in this draft," Wenzell was worried that, "if market conditions changed for the worse, the sponsors could use the draft as a moral commitment by First Boston, obliging it to arrange for the financing at the interest rates stated" (F. 69, R. 85). Needless to say, if Wenzell had not thought that there was a "substantial possibility" for First Boston to obtain the financing subcontract, he would not have raised the conflict-of-interest or moral commitment problems with Hughes.

Nor was Wenzell's concern only a momentary one. He had also raised with Raben of Sullivan & Cromwell, counsel for First Boston, the question as to "whether any problems would arise if it developed in the future that a proposal was accepted by the Government and First Boston was requested to arrange for the sale of debt securities" (F. 72, R. 87). Raben became so concerned about the problem that he cautioned Wenzell that "the board of directors of First Boston should consider whether they wanted to accept the business and, if so, whether they should charge a fee" (*ibid.*), and Arthur Dean of Sullivan & Cromwell "felt that since Wenzell had served as a consultant to the Budget Bureau, First Boston might well handle the financing as a matter of public service and not accept any fee" (F. 72, R. 87–88).

Thus, the fact, as pointed out by respondent, that "as events turned out First Boston did not take a fee * * *, [and] therefore, had no pecuniary interest in the transaction * * *, [or] Wenzell * * * an indirect pecuniary interest through First Boston" (Resp. Br., p. 41), only emphasizes the attempt by First Boston to cure the situation in order to avoid the conflict-of-interest dilemma. But this attempt should not obscure the fact that Wenzell and First Boston had little doubt that First Boston would ultimately get the financing subcontract. Indeed, on March 9, Wenzell was quite candid in his concern to Director Dodge of the Budget Bureau as to "whether First Boston would be barred from participating in the financing because Wenzell had been employed as a consultant to the Bureau" (F. 85, R. 94–95). And by April 12, after Wenzell had submitted all financial data on interest and costs to the sponsors, "Wenzell expected that First Boston would handle the financial arrangements for the sponsors if a contract resulted from the April 10 proposal" (F. 108, R. 107).

From this cataloging of Wenzell's discussions with respect to the financing, the Court should not be left with the impression that he did nothing more in order to realize his expectation. From the very beginning of his duties as a Budget Bureau consultant, Wenzell did much to involve First Boston intimately in the preliminary negotiations. As early as the January 20 meeting, "Wenzell thought that it was inevitable that various questions relating to financing an enterprise such as the OVEC project would arise at the * * * meeting and that it would be desirable to have

an expert available to answer such questions" (F. 49, R. 72). Thereupon, "[o]n his own volition and without consulting any representative of the defendant or of First Boston, Wenzell took with him Paul Miller, an assistant in First Boston's buying department. Miller had participated actively in the financing of the OVEC project in which First Boston had acted as financial agent for OVEC" (*ibid.*). Miller attended the meeting as a First Boston man.[2] Similarly, at the March 1 meeting, "Wenzell brought with him Powell Robinson, an assistant vice president of First Boston's sales department, who attended the meeting" (F. 74, R. 89). Beyond this, of course, every bit of information with respect to the cost of financing which Wenzell obtained, all the advice and considered opinions which Wenzell conveyed on this subject to the sponsors and the Budget Bureau, were prepared in close consultation with First Boston (see, *e.g., supra,* pp. 4–5, 15–16; and see our main brief, pp. 21–24).

In addition to these overt actions involving First Boston intimately in the negotiations, Wenzell appears also to have relied on his acquaintance with the Dixon-Yates group and his course of dealings with them. He had known Dixon, McAffee and Yates for many years because First Boston had done financing for them in the past (see, *e.g.*, Fs. 46, 65, R. 71, 80). At the very first meeting which Wenzell attended, on January 20, 1954, he made it a point to let Dixon

[2] In the proceedings before the Court of Claims, Miller admitted that even prior to April 22, he personally had hoped that First Boston would become the financing agent, and that he felt that first Boston and the sponsors were "all going in the same direction" (Tr. 793–794).

know "that during the previous summer he had made a confidential study for the Budget Bureau in Washington and had been recalled by the Bureau. He also told Dixon that he was attending the January 20 meeting as a representative of the Budget Bureau rather than as a First Boston man" (F. 53, R. 75).

As we have already indicated, the sponsors also acted as if there was a strong probability that First Boston would become the financial agent. They early evidenced concern over Wenzell's activities with respect to the possibility that he might be involved in a conflict of interest. During the third week in February, Wenzell, Dixon, and Daniel James, Dixon's counsel, had a discussion. James felt that "First Boston would receive first consideration as financial agent because of its experience on the OVEC project" (F. 68, R. 84). Dixon "asked whether Wenzell had considered the possibility that criticism and embarrassment might result from the fact that Wenzell, as an officer of First Boston, had been doing special work on a project for the Bureau of the Budget, if it later developed that First Boston should be employed to handle the financing of the same project" (F. 68, R. 84–85). Short of an absolute commitment, it hardly seems that at this early date the sponsors could have done more than they did to indicate that there was a "substantial possibility" that First Boston would become the financing subcontractor. This becomes especially clear when it is remembered that, on February 4, Dixon himself "asked Wenzell to do him a personal favor and ascertain the opinion of First Boston on what the interest rates in the then current money market would be for financing a proj-

ect similar to the OVEC project" (F. 57, R. 76-77; see also *supra*, pp. 4-5, 7-8); on March 16, Wenzell arranged a meeting between Dixon, Yates and Linsley, Chairman of the Executive Committee of First Boston, "because Dixon wanted to make certain that the information given to him by Wenzell represented the opinion of some First Boston official like Linsley" (F. 86, R. 96); and, finally, "Dixon understood and believed that First Boston had been retained as of April 12, 1954, when First Boston was requested to issue the letter * * * and to advise Dixon on the procedure for obtaining a commitment of funds" (F. 116, R. 113).

In all these circumstances, the fact that the formal financing commitment from the Dixon-Yates group came shortly after Wenzell had left his position as consultant to the Budget Bureau cannot make a difference with respect to Wenzell's conflict-of-interest. In particular, as has been discussed in detail (*supra*, p. 10), the letter which First Boston was requested to issue on April 12, and which it did issue on April 14, was merely confirmatory of the oral information given by Wenzell with respect to the February 25 and April 10 proposals, and in fact was worded substantially the same as Wenzell's original interest opinion letter of February 24. The financial arrangements which were ultimately worked out stemmed directly from Wenzell's and First Boston's work during the months of January to April. Thus, to characterize the chain of events leading up to the retention of First Boston as "at most [only] a hope" that "First Boston might get the job" is to ignore the very vital

interrelationship of the sponsors, Wenzell, and First Boston from the very beginning. To be sure, Lehman Brothers was ultimately retained for 40 percent of the financing along with First Boston with 60 percent. Whether this move was presumably because "Lehman Brothers had some talents that would be helpful in connection with the financing of the project * * *" (F. 111, R. 110), or whether it had its origin in an attempt by Dixon-Yates to cure the conflict-of-interest situation, is of little importance, for the conflict-of-interest statutes are concerned not only with what actually happens but also with what *may* happen (see our main brief, pp. 59–62, 71–74). Congress laid down an across-the-board preventive rule of disinterestness, and it did not provide that the flat prohibition on a conflict-of-interest should cease to apply if it turned out, in a particular case, that no actual harm resulted or that the harm was somehow cured.[*]

III

THE CONTRACT WHICH FOLLOWED FROM THE TRANSACTIONS IN WHICH WENZELL PARTICIPATED IS UNENFORCEABLE UNDER THE POLICY OF 18 U.S.C. 434

The purpose of the conflict-of-interest statutes in general and of 18 U.S.C. 434 in particular has been discussed in detail in our main brief (pp. 35–42). Suffice it to repeat here that 18 U.S.C. 434 lays down

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[*] It is no doubt for this reason that Congress became so alarmed over the Dixon-Yates contract and Wenzell's conflict of interest. See *Power Policy: Dixon-Yates Contract*, Staff Report of the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 84th Congress, 1st Sess. (Comm. print 1956).

a flat prohibition against the participation of any person in the contracts of any business entity in which he has an indirect interest if that person is acting for the United States in any transactions with the business entity (see our main brief, p. 36). The plain purpose of the statute is to protect the United States from the corrupting tendencies which alien economic interests may exert upon its representatives by preventing any Government agent from being tempted to advance such interest at the expense of the Government.

Although 18 U.S.C. 434 is a criminal statute which does not expressly provide that the consequences of a violation will be an invalidation of the contract originating from the unlawful transaction, the language and purpose of that statute look toward such a result. As was observed of a related conflict-of-interests statute: "The very comprehensiveness of the language used in every line of the section shows * * * a special effort on the part of Congress to make the remedy here as broad as the evil." 40 Op. A.G. 294, 300. Respondent's arguments to the contrary ignore both language and purpose.

1. Respondent maintains that "Congress deliberately refrained from including a blanket sanction of unenforceability in 18 U.S.C. 434" (Resp. Br., p. 63), and points to the legislative history of 18 U.S.C. 216, another conflict-of-interest statute which punishes a Government employee or Member of Congress for taking anything of value in aiding to procure a Government contract, to show that, even when Congress did consider the unenforceability of contracts,

it specifically abandoned a provision which would have made any contract obtained by such means automatically "'null and void'," in favor of a provision that such contract could only be declared null and void "'at the option of the President of the United States'" (Resp. Br., p. 64).

In thus citing the legislative history of 18 U.S.C. 216, respondent misconceives the issue. The problem in the present case is whether the contract should be enforced as if Wenzell had never had anything to do with it. Under the statute there is ample authority for the proposition that the contract may be considered invalid because of Wenzell's conflict of interests. It makes little difference on this record whether the contract be considered void or voidable, since the United States expressly disaffirmed the contract after its contracting agency (AEC) learned the whole story of Wenzell's activities.[7]

2. The absence of a provision making the contract unenforceable under the circumstances is not controlling; rather, it is necessary to look to the basic

[7] Wenzell's activities were not fully disclosed until after the contract was made. Nor did even the Budget Bureau learn that First Boston had been retained as financial agent until February 18, 1955—more than three months after the contract was signed (F. 127, R. 117-118). It was not until hearings before the Securities and Exchange Commission in December 1954 (F. 126, R. 117), and the subsequent hearings held by the subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, that the AEC had sufficient information to consider the effect of Wenzell's actions. It concluded, on the advice of its counsel, "that the contract was not an obligation which could be recognized by the Government." (F. 20, R. 56; F. 128, R. 118).

purpose of the statute and how the statute and similar enactments have been applied by the courts in specific instances. We have already shown in our main brief that, as a general rule, where a statute pronounces a penalty for an act, a contract founded on such act is unenforceable even though no specific provision is contained in the statute (main brief, pp. 68–72). This general rule is derived from the principle that a contract which contravenes or tends to defeat the purpose of legislation is against public policy. The rule and principle were amply explained and applied by this Court in the conflict-of-interest statutes relating to Government employees concerned with public land and Indian matters. *Prosser* v. *Finn*, 208 U.S. 67; *Waskey* v. *Hammer*, 223 U.S. 85, 93, 95; *Ewert* v. *Bluejacket*, 259 U.S. 129, 138. And the court below has applied the same principle to the statutory antecedents of 18 U.S.C. 434, in *Curved Electrotype Plate Co.* v. *United States*, 50 C. Cls. 258, 273, and in *Rankin* v. *United States*, 98 C. Cls. 357, 367.

Respondent, in an attempt to answer the Government's argument, insists that the sanction of invalidation of a contract under a penal statute may only be applied "where the alleged illegality was so inherent in the contract itself, * * * that the contract could not be enforced without giving judicial sanction to the judicial act" (Resp. Br., p. 66). Specifically, with respect to *Curved Electrotype* and *Rankin*, respondent attempts to distinguish them from the present case by stressing that in those cases "the acts of the Government official which were alleged to have bound the Government were in direct violation of the Act, * * *

the wrongdoer would have profited by enforcement of the contract, and * * * the court could not enforce the contract without giving judicial sanction to a statutory violation" (*id.*, at p. 72). But the illegality in this case was inherent in the contract itself because the very proposal which served as a basis for the contract depended upon all the work which Wenzell did while he served as consultant to the Government (see, especially, *supra*, pp. 20–21); Wenzell's activities were in direct violation of the Act, Wenzell had every reason to believe, at that time, that he and his firm *would* profit by enforcement of the contract, although in this instance he did not because of First Boston's decision not to take a fee; therefore, since Wenzell's activities violated the statute, any enforcement of the contract would in effect give judicial sanction to the type of infected bargain which Congress was seeking to prevent.

3. Respondent next argues that, since Wenzell did not have the power to make, and did not negotiate, the contract, and since First Boston did not take a fee, the enforcement of the contract would not require the Court to sanction Wenzell's activities (Resp. Br., pp. 70–71). But, after the transaction has been influenced by an interested representative of the Government, the consequences of that influence cannot be removed, *ex post facto*, by some curative unilateral gesture on the part of the representative or his employer. In this case, the gesture was a very slowly disclosed waiver of First Boston's fees. But the relevant period was while Wenzell was transacting business for the Government, and, during that period,

he had an indirect interest in the contract. The purpose of the statute is to prevent any temptation to advance personal interests at the expense of the Government; the statute is directed *at what could happen* as a result of a conflict of interest as well as what actually happens (see *supra*, p. 29). What happened subsequently, therefore, could not erase the effects of his activities on the transaction—activities which violated 18 U.S.C. 434 and which therefore put the entire transaction in doubt—a doubt which it was the purpose of the statute to eliminate.

1. Respondent's final argument is in effect that, even if there had been a conflict of interest, and even if enforcement could be denied, that remedy should be applied only against the wrongdoer (see Resp. Br., p. 72)—in this case Wenzell—so that, although First Boston might be unable to enforce a contract with the Government, Dixon-Yates, the third party, should be allowed to have the contract enforced. But as we have pointed out in our main brief (p. 77), contracts tainted by a violation of 18 U.S.C. 434 are not invalidated because the private contractor is guilty of complicity in the violation or because it failed to discern and effectively remove the infecting violation; invalidation is not fundamentally a sanction against the contractor, but a guarantee of the integrity of the federal contracting process. Congress desired that federal contracts be untainted by the possibility of a dual-interest, and therefore it provided the flat prohibition of Section 434. The enforcement of that prohibition cannot be frustrated by treating a tainted contract as valid because the suing party is innocent

of wrongdoing. The contract still remains infected with the prohibited conflict-of-interest.

The Court of Claims made much of the fact that Dixon-Yates could not have fired Wenzell because they had not hired him. But, as we have stressed in our main brief (pp. 78–79), if Wenzell had been a substantial stockholder of the Dixon-Yates companies themselves, the Dixon-Yates group would have been powerless to dismiss him from his Government employment or to sever his connection with their own company. Yet, the contract would have clearly been unenforceable. In the present case, it has already been shown in detail how deeply involved Dixon-Yates was with Wenzell and First Boston from the very beginning (*supra*, pp. 24–29). Despite the sponsors' professed concern about the conflict of interest, they continued to deal with Wenzell while he was a Budget Bureau consultant. Despite the fact that they never knew when he formally resigned, the sponsors continued to deal with him on the same basis as before his status was questioned (see main brief, pp. 74–75). Moreover, the sponsors continued to utilize the service of First Boston and ultimately retained it as a financial agent (see *id.*, at p. 76). The sponsors never even hinted to Wenzell or First Boston that, if Wenzell continued as a Government consultant, his company (First Boston) could not hope to become the financial agent for the project. But the Government was unaware of the retention of First Boston (and thus the fruition of the conflict of interest) during the entire period of contract negotiations from July 7 until No-

vember 11, and did not learn of the retention until February 18, 1955 (F. 127, R. 117–118; see *supra*, p. 31, n. 7). Dixon-Yates, on the other hand, was well aware of the conflict problem throughout the whole period. Under these circumstances, we submit that, if this contract were to be enforced, the courts would be giving judicial sanction to the violation of the statute.

5. Under the statute, the Government has a clear power to disaffirm because of the conflict of interest. Once the legislature has defined the objective circumstances of the kinds of conflicts and potential conflicts it considers dangerous to the integrity of public contracts, the right of the executive to rescind when those circumstances are present automatically follows. This principle is well illustrated by *City of Findlay* v. *Pertz*, 66 Fed. 427 (C.A. 6). In that case, an employee of a municipal gas works arranged for the purchase of certain equipment by the city. He received a commission from the seller upon each item purchased, in violation of a state statute forbidding municipal employees from being directly or indirectly interested in any contract for the purchase of property by their city. When the employee's interest was discovered, the city rescinded the contract. In the suit which followed, the Sixth Circuit distinguished between the contract of purchase, which was legitimate on its face, and the employee's commission arrangement, which was absolutely void. Noting that "[t]he means by which the city may have been induced to enter into it [the contract] was the vicious element in the trade",

(66 Fed. at 436), the court held that, in view of the violation of the statute, the city might repudiate or affirm the contract as it should elect.

In *Curved Electrotype Plate Co.* v. *United States*, *supra*, 50 C. Cls. 258, 272, the Court of Claims, in addition to its language deeming an express or implied contract made under prohibited circumstances absolutely void, also stated that, if "[t]he Public Printer [had assumed to] act for the Government so as to bind it when he had an interest direct or remote in the subject matter of the contract, * * * his contract could have been disaffirmed by the Government." Similarly, in *Rankin* v. *United States*, 98 C. Cls. 357, 367, the relationship of the Government to the tainted transaction was likened to that of a principal, who "on being informed of the participation of his agent on his own account and interest in a transaction * * * may disaffirm the contract so entered into without reference to any actual damage to the principal or benefit to the agent." This same principle was applied in *Crocker* v. *United States*, 240 U.S. 74.

The legislative history of 18 U.S.C. 216 (Act of July 16, 1862, 12 Stat. 577) (*supra*, pp. 30-31) itself reflects the congressional view that disaffirmance was a "common principle." The brief debate on the anti-bribery bill, S. 358, 37th Cong., 2d Sess., turned on whether a contract procured through bribery should be absolutely void, even if the Government wanted to affirm it. As a substitute for the inflexible proposal contained in the bill as reported, an amendment codifying the principle of disaffirmance was offered. Senator William P. Fessenden of Maine, a dis-

tinguished lawyer of his day, explained that the amendment "is merely carrying out a common principle. The principle upon which it is rendered null and void is simply that the using of this kind of influence is really an imposition upon the Government, and the common principle is that the party who is imposed upon may consider the contract void if he pleases." 37 Cong. Globe 2958.

It must be remembered that the transaction here is a public one, not a private bargain. This difference is one which Wenzell and respondent do not appreciate. The standards of conduct acceptable for private bargains are not the same as the standards for a public contract; the ordinary morals of the market place will not do for a contract made on behalf of the nation. Section 434 extends the doctrine which obtains in the law of trusts to anyone who acts for the United States in a transaction. That doctrine "stands upon our great moral obligation to refrain from placing ourselves in relations which ordinarily excite a conflict between self-interest and integrity * * *. In this conflict of interest, the law wisely interposes. It acts not on the possibility that, in some cases, the sense of * * * duty may prevail over the motives of self-interest, but it provides against the

[8] Similar codification provisions, supplemented by certain additional remedies, were included in recent bills on conflict of interest laws before the Congress. See, *e.g.*, H.R. 1900, § 218, 86th Cong., 1st Sess.; H.R. 10575, § 12(c), 86th Cong., 2d Sess.; Hearings on Federal Conflict-of-Interest Legislation before the Antitrust Subcommittee of the House Committee on the Judiciary, 86th Cong., 2d Sess., p. 482.

probability in many cases, and the danger in all cases, that the dictates of self-interest will exercise a predominant influence, and supersede that of duty." *Michoud* v. *Girod*, 4 How. 503, 555, quoted in *United States* v. *Carter*, 217 U.S. 286, 308–309. Under the clear policy of 18 U.S.C. 434, the United States had every right to disaffirm when all the facts were known to the contracting party. Under the facts of this case, it was under a duty to do so.

CONCLUSION

For the foregoing reasons, and for the reasons presented in our main brief, the judgment of the Court of Claims should be reversed.

Respectfully submitted.

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OCTOBER 1960.

APPENDIX

INDEX TO INDIVIDUALS NAMED IN THE FINDINGS[1]

Adams, Francis I.—Chief of Bureau of Power, Federal Power Commission (F. 85, R. 95).

Barry, J. M.—Chairman, Executive Committee, The Southern Company (F. 3, R. 49).

Canaday, Paul—Vice President and Director, Middle South Utilities Co. (F. 55, R. 76).

Coggeshall, James, Jr.—President, First Boston (F. 25, R. 58).

Clapp, Gordon, General Mgr., TVA (F. 36, R. 64).

Dean, Arthur—Attorney (Sullivan & Cromwell), Counsel to First Boston (F. 70, R. 86).

Dixon, Edgar H.—President, Middle South Utilities and MVG (F. 3, R. 49).

Dodge, Joseph M.—Director, Bureau of the Budget (1953–54) (F. 23, R. 57).

Donnelly, E. J.—Budget Examiner, Bureau of the Budget (F. 59, R. 78).

Grahl, James L.—Budget Examiner, Bureau of the Budget (F. 76, R. 91).

Hallingby, Paul—Assistant to President Dixon, Middle South (F. 62, R. 79).

Harter, Robert L.—Vice President, First Boston Corp. (F. 58, R. 77).

James, Daniel—Attorney (Cahill, Gordon), Counsel to Dixon (F. 68, R. 84).

Linsley, Duncan—Chairman, Executive Committee, First Boston Corporation (F. 25, R. 58).

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[1] The record references are to the first instance in which an individual is mentioned and identified in the findings of the Court of Claims.

McAfee, J. W.—President, Union Electric Co. (F. 37, R. 65).

McCandless, William F.—Assistant Director for Budget Review, Bureau of the Budget (F. 37, R. 65).

Miller, Paul—Assistant in Buying Department, First Boston Corporation (F. 49, R. 72).

Nichols, Kenneth D.—General Manager, AEC (1954–55) (F. 39, R. 66–67).

Pilcher, Milton A.—Budget Examiner, Bureau of the Budget (F. 76, R. 91).

Raben, John R.—Lawyer (Sullivan & Cromwell) (F. 70, R. 86).

Roberts, Harold E.—Assistant to Adams, Bureau of Power, Federal Power Commission (F. 92, R. 99).

Robinson, Powell—Assistant Vice President, Sales Department, First Boston Corporation (F. 74, R. 89).

Schwartz, Carl H.—Chief, Resources and Civil Works Division, Bureau of the Budget (F. 73, R. 88).

Seal, Tony—Vice President, EBASCO Services, Inc. (F. 53, R. 75).

Smyth, Henry DeWolf—Member, AEC (F. 141, R. 125).

Strauss, Louis L.—Chairman, AEC (F. 37, R. 64).

Wenzell, Adolphe H.—Vice President and Director, First Boston Corporation (F. 24, R. 58).

Whittemore, James E.—Head of Public Utilities Department, Lehman Bros. (F. 111, R. 110).

Williams, Walter J.—General Manager, AEC (1953) (F. 37, R. 64).

Woods, George D.—Chairman of the Board, First Boston Corporation (F. 24, R. 57).

Yates, Eugene A.—Chairman of the Board, Southern (F. 4, R. 50).

Zuckert, Eugene M.—Member, AEC (F. 141, R. 125).